No. 89-786

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GARREY CARRUTHERS, GOVERNOR OF NEW MEXICO, O.L. MCCOTTER, SECRETARY OF CORRECTIONS, and ROBERT J. TANSY, WARDEN OF THE PENITENTIARY OF NEW MEXICO,

Petitioners,

v.

DWIGHT DURAN, LONNIE DURAN, SHARON TOWERS, AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICI CURIAE FOR THE STATES OF HAWAII, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING, AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a federal court, on motion of state officials who are subject to a prison consent decree agreed to by predecessor officials, may refuse to vacate those portions of the decree that, as legal developments since entry of the decree make clear, go far beyond any federal-law requirements.

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INTEREST OF AMICI

The State of Hawaii, 38 other States and the Commonwealth of Puerto Rico file this brief in support of petitioners' request that this Court grant certiorari to review the decision of the Tenth Circuit in this case. That decision presents three important, related issues affecting federal court control over state government, particularly in the area of state prison administration.

The first question is whether, on the authority of *Local No. 93 v. City of Cleveland*, 478 U.S. 501 (1986), a federal court may refuse to modify consent decree provisions governing state prison administration without even making an inquiry into whether those provisions are proper remedies for violations of federal law. The second question is whether, under *System Federation No. 91, Ry. Employes' Dep't v. Wright*, 364 U.S. 642 (1961), a federal court is obliged to examine post-decree changes of law and to vacate any decree provision that is not a proper remedy under present federal law. The third question is whether, if the court undertakes the required inquiries, those inquiries must be searching ones, involving scrutiny of ~~each~~ challenged provision to determine if it is well-founded in a specific federal right, or whether a court's recitation that the "totality of conditions" violates the Eighth Amendment (at one prison) is sufficient to justify measures (even at other prisons) that address matters beyond federal concern.

Those issues—which affect consent decrees directly, and injunctions entered over objection to some extent as well—shape the States' ability to preserve the degree of independence from federal court supervision that is preserved to them under the Constitution—*e.g.*, under the Eleventh Amendment bar on federal court enforcement of state law against state officials, *see Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), as well as the federalism and separation of powers principles that this Court has repeatedly stressed in rejecting undue intrusions on state prison officials' discretion, *see*,

e.g., *Turner v. Safley*, 107 S. Ct. 2254 (1987). The issues also critically affect the States' ability to operate their prisons with the measure of flexibility and discretion that is necessary for sound administration. *See, e.g.*, *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1881 (1989); *Whitley v. Albers*, 475 U.S. 312, 321 (1986). For those reasons, the issues are important to the amici States, almost all of whom either are now or have been subject to injunctions—entered either with state officials' consent or over state officials' objection—governing their prisons and other institutions.[1]

STATEMENT OF THE CASE

In 1980, based on a complaint challenging the conditions at a single prison in New Mexico, predecessors of petitioners, who are New Mexico officials responsible for the operation of New Mexico's prisons, entered into a consent decree that governs the operation of all of the State's maximum and medium security prisons, including three facilities that were not opened until after the decree was entered. The decree comprehensively regulates food services, physical conditions of the facilities, sanitation, clothing, medical and mental health care, correspondence, access to attorneys and other legal resources, and staffing requirements for safety. Those provisions are not challenged. Pet. 3-5.

In 1987, petitioners moved to vacate a number of decree provisions on the ground that they are not proper remedies for any violation of federal law as it has been clarified since 1980. Those provisions, among other things, forbid double celling, no matter what the condition of the cells; require 8 hours a day of meaningful activity for most prisoners, including vocational, educa-

[1] As the petition for a writ of certiorari notes (at 14 n.18), the ACLU National Prison Project has reported that 22 States currently operate some or all of their prisons under consent decrees and that 38 operate some or all of their prisons under judicial order.

tional, and work programs; impose restrictive conditions on prison officials' use of maximum security classification and disciplinary measures; compel liberal visitation policies; and restrict petitioners' general inmate classification practices. *See* Pet. 5-10. Because those provisions are not proper federal law remedies, petitioners argued, they have no basis except state law,[2] which means that they may not be enforced because, under the Eleventh Amendment, a federal court has no jurisdiction to enforce state law obligations against state officials. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).[3]

The district court refused to vacate the challenged provisions (Pet. App. 16a-45a), and the court of appeals affirmed (*id.* at 1a-15a). One ground for the court of appeals' holding was that continued enforcement was proper even without serious inquiry into the specific federal law basis for each particular challenged provision. Pet. App. 14a-15a. In the court's view, this Court's decision in *Local No. 93 v. City of Cleveland*, 478 U.S. 501 (1986), authorized continued enforcement of all of the provisions simply because the decree as a whole met three conditions: (1) it "springs from and serves to resolve a dispute within the district court's subject matter jurisdiction"; (2) it "comes within the 'general scope' of the case made by [respondents] in the . . . complaint"; and (3) it "furthers the objectives upon which the complaint is based." Pet. App. 14a-15a. The court of appeals concluded that state officials could therefore properly be compelled to comply with "broader relief than the court might

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[2] In fact, the decree provision concerning inmate activity expressly states that it is based on state law (Pet. App. 142a), and the portion of the complaint addressing classification expressly relies on state law (*id.* at 201a).

[3] As petitioners explain (Pet. 11 n.13), there plainly was no waiver of Eleventh Amendment immunity by the State of New Mexico in this case, and neither the district court nor the court of appeals concluded otherwise.

possibly have been empowered to enter after trial." *Id.* at 15a.

In the alternative, the court of appeals ruled that continued enforcement of all of the challenged provisions was proper because they "[a]rguably . . . relate to, or tend to vindicate, federally protected rights." Pet. App. 11a. The primary basis for that holding was the court's conclusion that each of the provisions (at all of the prisons covered by the decree) was justified by the allegation that the "totality of the prison conditions" (at a single prison) was unconstitutional. *Id.* at 12a-13a. The court also included a footnote—containing no analysis and citing no decision that actually upheld measures like those at issue in this case—suggesting that each of the provisions by itself might be a proper federal law remedy. *Id.* at 13a n.10.[4]

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals' decision presents three issues that are of great importance to the maintenance of proper limits on long-term federal court control over state prison administration. First, relying on this Court's decision in *Local No. 93*, the court held that a federal court may refuse to modify consent decree provisions challenged by state prison officials without even making a particularized

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[4] The decisions cited by the court of appeals were *Pell v. Procunier*, 417 U.S. 817 (1974), which *upheld* visitation policies more restrictive than those compelled by the present decree; *Rhodes v. Chapman*, 452 U.S. 337 (1981), which *upheld* double celling in cells smaller than those at issue in the present case; *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), which *rejected* claims that classification and inmate activity were properly addressed in the challenged decree; and *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.), *modified*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042 (1983), which *upheld* double celling, reversed a space requirement like that at issue here, and rejected a "totality of conditions" analysis like the one relied on by the Tenth Circuit in this case.

inquiry into whether those provisions are proper remedies for federal law violations. Second, when the court did look at the federal law basis for the challenged decree provisions, the court ignored this Court's decision in *System Federation No. 91, Ry. Employes' Dep't v. Wright*, 364 U.S. 642 (1961), and failed to examine post-decree changes of law or to vacate those decree provisions that are not proper remedies under *present* federal law, although there were significant changes in the pertinent federal law in this case following entry of the decree in 1980.[5] Third, the court conducted only the most superficial inquiry into whether each challenged provision is well-founded in a specific federal right, relying instead on inadequate passing citations to decisions that do not support the challenged decree provisions (*see* note 4, *supra*) and on the theory that a "totality of conditions" violation at one prison justifies measures, even at other prisons, that address matters beyond any federal concern.[6]

Those rulings all concern aspects of the general standards governing a federal court's modification of consent decree provisions that bind state officials in the administration of state institutions, such as prisons and mental-illness and -retardation institutions. Those standards

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[5] Notably, this Court's 1981 decision in *Rhodes v. Chapman*, *supra*, not only established that there is no constitutional right to single celling but, more generally, made clear that the Eighth Amendment does not address all prison conditions but only those conditions—"the minimal civilized measure of life's necessities," 452 U.S. at 348, namely, food, clothing, shelter, medical care, sanitation, and safety—the deprivation of which may constitute the unnecessary and wanton infliction of pain. Perhaps more important, this Court's 1984 decision in *Pennhurst* established that a federal court has no authority to enforce state law duties against state officials where, as here, there has been no waiver of the State's Eleventh Amendment immunity.

[6] In light of the court's inadequate analysis, it is hardly surprising that, as petitioners demonstrate (Pet. 25-28), there is no sound federal basis for the particular provisions at issue in this case.

have produced sharp conflicts in views and practices among the courts of appeals and have been the subject of considerable recent scholarly commentary pointing out the unresolved questions in the area. This case presents an important opportunity for the Court to clarify the modification standards generally and, more particularly, to address the meaning and limits of *Local No. 93* and the vitality of *System Federation*.

This case also should be heard by the Court because the approach taken by the Tenth Circuit threatens basic constitutional values. As this Court has often made clear, the federal courts must respect fundamental constitutional limits—founded in the Eleventh Amendment, in the Tenth Amendment, in principles of federalism and separation of powers embodied throughout the constitutional structure—on their authority to intrude on States' decision making, especially in areas like prison administration. *See, e.g., Pennhurst State School & Hosp. v. Halderman, supra* (federal courts may enforce only federal law obligations against state officials); *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1881 (1989) (federal courts must accord substantial deference to prison officials' judgments); *Turner v. Safley*, 107 S. Ct. 2254 (1987) (same, plus added deference where prisons are *state* prisons); *see also Rhodes v. Chapman*, 452 U.S. 337 (1981) (Eighth Amendment plays limited role in prescribing prison conditions). The Tenth Circuit's approach to the State's decree modification motion in this case would, if generally followed, render meaningless those limits on federal judicial authority over States. This Court should grant the petition to repudiate the Tenth Circuit's reliance on *Local No. 93* and to hold that a federal court, presented with a motion by state officials to modify a consent decree, must carefully examine the decree to conform it to the requirements of present federal law and vacate those provisions that are not proper federal law remedies.

ARGUMENT

I. This Court Should Grant Review To Clarify The Standards Governing Modification Of Consent Decrees Binding State Officials.

The issues raised in this case have produced a wide divergence of holdings and approaches among the courts of appeals. For example, like the Tenth Circuit in the present case, the Second Circuit, relying on *Local No. 93*, has held that modification of consent decree provisions binding state officials—even provisions that would not be proper post-trial remedies for violations of federal law—may be denied if the decree (1) springs from and serves to resolve a dispute within the court's jurisdiction, (2) comes within the general scope of the case made by the pleadings, and (3) furthers the objectives of the law underlying the complaint. *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (1989). Refusing to vacate prison consent decree provisions that were based in state law, the Second Circuit in *Kozlowski* concluded that *Local No. 93* established sufficient conditions for entry and enforcement of a consent decree, 871 F.2d at 244; that Eleventh Amendment immunity had been waived by the entry of the decree (though the court made no inquiry into the statutory authority of the signatory officials to waive Eleventh Amendment immunity), *see ibid.*; and that the principles of deference that the Court has stressed in prison cases had no application to the question whether changed conditions warranted modification of the decree, *id.* at 248 n.8.[7]

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[7] The Third Circuit has expressed the same view as the Second Circuit on Eleventh Amendment waiver by entry into a consent decree. *See Vecchione v. Wohlgemuth*, 558 F.2d 150, 158-59, *cert. denied*, 434 U.S. 943 (1977); *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 678 F.2d 470, *cert. denied*, 459 U.S. 969 (1982). That position has been criticized by the Fifth and Sixth Circuits. *See Freimanis v. Sea-Land Service, Inc.*, 654 F.2d 1155, 1160 (5th Cir. 1981); *Taylor v. Perinini*, 503 F.2d 899, 901 (6th Cir. 1974), *vacated and remanded on other grounds*, 421 U.S. 982

The Fifth Circuit, in stark contrast, has rejected such reliance on *Local No. 93* in the context of a motion to modify a consent decree binding state officials. *Leslz v. Kavanagh*, 807 F.2d 1243, 1252, *reh'g denied*, 815 F.2d 1034, *cert. dismissed*, 483 U.S. 1057 (1987). The *Leslz* court concluded that both Eleventh Amendment immunity and federalism principles remained applicable in judging a State's modification motion. *Ibid.* It also adhered to this Court's *System Federation* decision, ruling that the consent decree at issue had to be reevaluated in light of the intervening decision in *Pennhurst* that federal courts may not enforce state law against state officials. 807 F.2d at 1253-54. After close examination of the present federal law basis for the challenged provision, the court held that the provision must be vacated because it required more (community placement of the mentally retarded under a "least restrictive alternative" standard) than the Constitution required (*id.* at 1249-52)—even though the district court on entering the consent decree had recognized that the decree might be based in federal as well as state law (*id.* at 1248 & n.6).[8]

Other circuits, too, have expressed views contrary to those relied on by the Tenth Circuit in this case. For example, as the *Leslz* court explained (807 F.2d at 1252

(1975). *See also Leslz v. Kavanagh*, discussed in text in the following paragraph.

[8] In *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.), *modified*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042 (1983), the Fifth Circuit rejected the broad view, taken by the Tenth Circuit here, that a "totality of conditions" violation justifies virtually any prison-reform measure. The court explained that "a generalized and 'vague conclusion' concerning the totality of conditions is insufficient" (*id.* at 1140 n.98) and said, "[t]he 'totality of the circumstances' test does not authorize us to reform all deficient prison conditions. The remedy must be confined to the elimination of those conditions that together violate the Constitution." *Id.* at 1153. Following that approach, the Fifth Circuit reversed various portions of the district court's decree, including a ban on double celling and a space requirement of 60 square feet per prisoner. *Id.* at 1151-52.

n.11), the Ninth Circuit in *Washington v. Penwell*, 700 F.2d 570 (1983), "refused to enforce against a state a consent decree provision that exceeded the bounds of constitutional requirements." The *Penwell* court reasoned that, because of Eleventh Amendment considerations, "[t]he draconian standards applicable to requests for modification of consent decrees against private parties . . . cannot apply" to consent decrees running against States. 700 F.2d at 574 (citations omitted). Similarly, both the Fourth and Eleventh Circuits have required that consent decrees against state officials be modified to the extent that post-decree constitutional decisions have mitigated the State's burdens: they have required, in the *Leslz* court's words (807 F.2d at 1253 n.11), that the decrees be "retailored to fit the revised scope of the right." Thus, in *Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981) (en banc), the Fourth Circuit, relying on the *System Federation* rule, ordered modification of a consent decree ban on double celling, explaining that, since entry of the decree, the State had opened new prisons and this Court had made clear in *Rhodes v. Chapman*, *supra*, that there was no Eighth Amendment basis for such a ban. And in *Newman v. Graddick*, 740 F.2d 1513, 1520-21 (11th Cir. 1984), the Eleventh Circuit required the district court to consider modification of consent decree provisions, including one requiring 60 square feet per prisoner, in light of the post-decree decision in *Rhodes v. Chapman*.[9]

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[9] Finally, in contrast to the Tenth Circuit's approach in the present case, the Seventh and Third Circuits have indicated that a federal court must weigh federalism concerns in entering or enforcing consent decrees against state officials. *Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 340-41 (7th Cir. 1987); *Georgevich v. Strauss*, 772 F.2d 1078, 1085 (3d Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1028 (1986); *Duran v. Elrod*, 713 F.2d 292, 297 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984); *see* Note, *Federalism and Federal Consent Decrees Against State Government Entities*, 88 Colum. L. Rev. 1796, 1801 & nn. 32, 33 (1988).

Of course, although some of the decisions discussed in this brief pre-date *Local No. 93*, that decision did not involve either modifica-

Not surprisingly—given the questions left unanswered by *Local No. 93*, and the tremendous expansion in the federal courts' control of public institutions, *see* note 1, *supra* (38 States operate prisons under judicial order, 22 under consent decree)—there is a considerable volume of recent scholarly commentary in this area. That commentary discusses the conflicts among the lower courts and makes clear that the issues raised by consent decrees like the one at issue in this case are profoundly important to the general problem of judicial control of the executive and legislative branches of government. *See, e.g.*, Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 Colum. L. Rev. 1796 (1988); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 Harv. L. Rev. 1020 (1986); Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. Chi. Legal F. 19; Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 Duke L.J. 1265; Jost, *From* Swift *to* Stotts *and Beyond: Modification of Injunctions in the Federal Courts*, 64 Tex. L. Rev. 1101 (1986); McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal F. 295; Rabkin & Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 Stan. L. Rev. 203 (1987). *See generally* 1987 U. Chi. Legal F. 1 *et seq.* (symposium on consent decrees).[10]

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tion (as opposed to entry) of a consent decree or, more fundamentally, any of the constitutional principles that affect federal judicial control over state governments. It is those principles that are central to the recognition by various courts of appeals that there are and must be limits on the ability of federal courts to maintain perpetual control over state institutions.

[10] Other voices, too, have recognized the special need for limits on the role of federal consent decrees in controlling governmental action. *See, e.g., Money Store, Inc. v. Harriscorp Finance, Inc.*, 885 F.2d 369, 374 (7th Cir. 1989) (Posner, J., concurring); *Sansom*

This case presents critical issues that need clarification by this Court—the meaning and limits of *Local No. 93*'s discussion of consent decrees; the continuing vitality of *System Federation*'s rule that a consent decree may be enforced only to the extent it implements *present* federal law; the need for careful inquiry into the federal law basis of each particular challenged decree provision in order to ensure respect for a State's Eleventh Amendment immunity and principles of federalism; and the inappropriateness of relying on a "totality of conditions" analysis to justify remedial measures that address prison conditions over and above those which ensure compliance with the Eighth Amendment. The petition should be granted to "establish uniform principles recognizing necessary limits on federal courts' authority to maintain control over state institutions through consent decrees." Pet. 30.

II. The Court Of Appeals' Approach Disregards States' Constitutionally Based Freedom From Federal Court Control Over State Institutions Except As Required By Federal Law.

Not only is clarification required on the issues raised by the court of appeals' decision. Correction of the court's approach is required as well. That approach threatens fundamental constitutional principles that preserve States' sovereign independence on matters outside the scope of federal law.

Comm. v. Lynn, 735 F.2d 1535, 1544 (3d Cir.), *cert. denied*, 469 U.S. 1017 (1984) (Becker, J., concurring); *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1134-37 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984) (Wilkey, J., dissenting); *Memorandum of Attorney General Edwin Meese III, Department Policy Regarding Consent Decrees and Settlement Agreements*, March 13, 1986, *reprinted in* 3 Dep't of Justice Manual § 4-2.100A, at 4-45 (1987) ("[T]he executive's position [is] that it is constitutionally impermissible for the courts to enter consent decrees containing such provisions where the courts would not have had the power to order such relief had the matter been litigated.").

The combination of the court of appeals decision's several deficiencies—reliance on the three-part test it derived from *Local No. 93*; failure to follow *System Federation*'s requirement that consent decrees be justified by present law; and refusal to make a careful examination of the specific federal basis for each particular challenged decree provision—leaves the State of New Mexico, apparently in perpetuity, subject to federal court commands that have never been plausibly justified as necessary or appropriate to vindicate any existing federal right. That result is profoundly incompatible with the structure of government established by the Constitution. In our system, a State's sovereign activities are independent of any federal control, let alone federal *court* control, unless federal law provides (in the present tense) a basis for restricting state authority. The court of appeals' decision abridges that independence.

One critical aspect of States' independence is jurisdictional: the Eleventh Amendment recognizes the sovereign immunity of state officials from suit in federal court in their official capacity. That immunity—where, as here, it has never been waived by the sovereign authorities of the State and has never been abrogated by Congress [11]—defeats federal jurisdiction over state officials except, under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), where federal law is at stake. That exception, however, is a narrow one: "*Young*'s applicability has been tailored to conform as precisely as possible to those specific situations in which it is 'necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to "the supreme authority of the United States."'" *Papasan v. Allain*, 478 U.S. 273, 277 (1986) (quoting *Pennhurst*, 465 U.S. at 105, and *Young*,

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[11] No pertinent federal legislation abrogates the State's Eleventh Amendment immunity in this case. *See Quern v. Jordan*, 440 U.S. 332 (1979) (42 U.S.C. § 1983 does not abrogate Eleventh Amendment immunity).

209 U.S. at 160). Accordingly, "'[a] federal court must examine *each* claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment.'" *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 251 (1985) (quoting *Pennhurst*, 465 U.S. at 121) (emphasis added). Those principles are undermined by the Tenth Circuit's approach to enforcement of the consent decree in this case, because that approach approves subjecting state officials to mandatory orders of a federal court without any examination of each decree provision being enforced and, therefore, without any assurance that those particular orders are necessary to vindicate federal rights.

The court of appeals' approach also threatens elementary constitutional principles—enshrined in the Tenth Amendment and in the basic structure of the Constitution—respecting the scope of substantive authority reserved to the States. Perhaps most fundamentally, "[t]he power of the federal courts to restructure the operation of local and state governmental entities is not plenary. It may be exercised only on the basis of a constitutional violation." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420-21 (1977) (internal quotation marks omitted).[12] In other words, a federal court may not intrude on state functions unless there is a constitutional basis for that intrusion: "A federal court, of course, must identify a

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[12] This case does not involve any federal statute that imposes substantive restrictions on States' authority to administer their prisons. (Although the complaint cites 42 U.S.C. § 3750(b), the court of appeals made no reference to that provision, and it is clear from a reading of the provision—which states the aims of certain federal grants—that it guarantees no individually enforceable rights of the sort that would support the present lawsuit.) Because federal legislation is not involved, the Court's decision in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (Tenth Amendment limits on congressional authority enforced chiefly through reliance on state representation in Congress), is inapplicable here.

constitutional predicate for imposition of any affirmative duty on a State." *Youngberg v. Romeo*, 457 U.S. 307, 319 n.25 (1982). In the present case, the Tenth Circuit's approach approves intrusions on state prison administration without any identification of an adequate constitutional predicate.

The same principles that require a federal basis for the exercise of power over States also require caution, deference, and respect for state independence in the interpretation of federal rights against state governments and in shaping federal equitable relief. Thus, the Court has often emphasized that "a scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 111 (1981) (internal quotation marks and citations omitted). The Court has also explained that the federalism concept embodied in the Constitution defines "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). *See also Rizzo v. Goode*, 423 U.S. 362, 378 (1976) ("[w]here, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law' ") (citation omitted). Nowhere is this special regard for state independence reflected in the Tenth Circuit's approach allowing federal courts to enforce contested provisions of a consent decree against state officials—thereby reshaping state government operations and resource allocation—without serious inquiry into whether those provisions are truly justified by federal law.

The concerns for state independence—together with complementary concerns about the appropriate limits on the role of federal courts vis-a-vis the political branches of government generally—are of special importance in the area of prison administration, where day-to-day flexibility and discretion are vital to officials' ability to preserve security and to control the "ever-present potential for violent confrontation and conflagration." *Whitley v. Albers*, 475 U.S. 312, 321 (1986) (internal quotation marks omitted). *See ibid.* (" 'a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators' ") (quoting *Rhodes v. Chapman*, 452 U.S. at 349 n.14). Thus, the Court has explained:

> [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

Procunier v. Martinez, 416 U.S. 396, 404-05 (1974) (footnote omitted). The Court has further observed:

> [T]he problems that arise in the day-to-day operation of a correction facility are not susceptible of easy solution. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.

Bell v. Wolfish, 441 U.S. 520, 547 (1979). *See also Thornburg v. Abbott*, 109 S. Ct. 1874, 1878, 1881 (1989)

("the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management"; "[i]n the volatile prison environment, it is essential that prison officials be given broad discretion"); *Turner v. Safley*, 107 S. Ct. 2254, 2259 (1987).[13] Notwithstanding those clear and repeated pronouncements, the judicial restraint mandated in prison reform cases is simply absent from the Tenth Circuit's approach to continued enforcement of the prison decree in this case. Yet that decree intrudes deeply into prison administration (*e.g.*, setting security classification, inmate discipline, and visitation standards) and substantially affects the State's allocation of resources (*e.g.*, requiring single celling and expensive inmate activity programs)—all without any careful attention to whether federal law requires such incursions on state sovereignty.

The court of appeals seems to have assumed that the consensual nature of the original decree renders inapplicable the federalism and separation of powers principles that appropriately limit federal court authority over state prison administration. That assumption is wrong. Even if those principles are not given precisely the same weight in a consent decree case as in a litigated decree case, "[t]he same factors that weigh against the granting of equitable relief in the form of an injunction should also militate against a federal court's entering or enforcing the identical measures in the form of a consent decree."

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[13] "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the Legislative and Executive Branches of Government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have, as we have indicated in *Martinez*, additional reason to accord deference to the appropriate prison authorities." 107 S. Ct. at 2259.

Note, 88 Colum. L. Rev. at 1803-04.[14] Microscopic governance of state prisons is an inappropriate task for federal courts (in the absence of a federal law basis for each particular measure) even if one set of state officials welcomes the transfer of authority to the federal courts. And the sovereignty of States under our Constitution is a living sovereignty: it is the present State, with its duly elected government and delegations of authority to present officeholders, that must set current policies, must establish current budgets, and must generally determine, within the bounds set by federal law, the appropriate current operation of state institutions. There is no federal interest in aiding one set of state officials to bind the hands of their successors and their state legislatures where federal law itself exercises no substantive control over the particular matter. Hence, in a consent decree case involving a State, the Constitution's fundamental federalism and separation of powers principles reinforce and give an additional foundation to the principle that this Court recognized even in the private party setting in *System Federation*—that a consent decree, as a matter of law, must be conformed to the *present* requirements of federal law.

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[14] Indeed, there may be reasons why federalism and separation of powers concerns are even greater in a consent decree case than in a litigated decree case. If there has been no trial on liability, not only has there been no adjudication of a violation to support the consent decree, but there is likely to have been little inquiry into the merits of the case (and almost certainly no appellate review) at the time the decree was entered, given the understandable desire of the court as well as the parties to bring at least the opening round of the litigation to an end. Even if the court in a class action has examined the decree to ensure that it is fair for the plaintiff class, there is likely to have been inquiry into whether the decree intrudes too much into state government, because no one is likely to press that view. *See* Note, 88 Colum. L. Rev. at 1805-08. *See also* Horowitz, 1983 Duke L.J. at 1294 (discussing *"The Problem of Defendants Who Would Like to Lose"*).

The Tenth Circuit's refusal to undertake a particularized inquiry into the present federal basis for each of the intrusive, contested provisions governing New Mexico's prison administration in this case upsets the proper constitutional balance and should be reversed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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